(13)

Nos. 91-543, 91-558, 91-563

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE STATE OF NEW YORK;
THE COUNTY OF ALLEGANY; and
THE COUNTY OF CORTLAND,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*
Respondents,

and

THE STATE OF WASHINGTON; THE STATE OF NEVADA;
and THE STATE OF SOUTH CAROLINA,
Intervenors-Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF FOR THE COUNCIL OF STATE GOVERNMENTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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MOTION FOR LEAVE TO FILE BRIEF FOR THE COUNCIL OF STATE GOVERNMENTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37 of the rules of this Court, *amicus* respectfully moves for leave to file the attached brief *amicus curiae* in support of petitioners. All petitioners and respondent have consented to the filing of this brief. This motion is made necessary by the failure of intervenors-respondents' counsel to provide consent.

Amicus, the Council of State Governments (CSG), is an organization whose members include all fifty state

governments and numerous elected and appointed officials throughout the United States. It and its members have a compelling interest in legal issues that affect state and local governments, particularly issues relating to constitutional protection afforded the states vis-a-vis the federal government.

For the foregoing reasons, *amicus* respectfully requests that it be allowed to participate in this case and file the annexed brief *amicus curiae*. *Amicus* is in a unique position to aid the Court in its consideration of the issues presented. The interests of *amicus* are direct and substantial. Its participation will facilitate the Court's thorough consideration of the issues and will bring important perspectives to bear on this case.

Accordingly, *amicus* CSG, by and through its undersigned counsel, respectfully requests that its motion for leave to file an *amicus curiae* brief in support of petitioners be granted.

Respectfully submitted,

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February 14, 1992

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BRIEF FOR THE COUNCIL OF STATE GOVERNMENTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

Amicus is an organization whose members include all fifty state governments and numerous elected and appointed officials throughout the United States. It and its members have a compelling interest in legal issues that affect state and local governments, particularly issues relating to the constitutional protection afforded the states vis-a-vis the federal government.

STATEMENT

Stripped to its essence, the Low-Level Radioactive Waste Policy Amendments Act of 1985 ("the 1985 Act") requires New York to create within its borders a low-level radioactive waste disposal site, and to do so no later than January 1, 1996. This command is enforced by the threat of involuntary and open-ended liability for all such waste located or generated in the state from that day forward.

The law sets a number of interim deadlines for meeting Congress's command:

- January 1, 1988, for completing a site plan and a development schedule for the site. 42 U.S.C. § 2021e(e)(1) (1988).
- January 1, 1990, for either submitting a license application for a proposed disposal site to the U.S. Nuclear Regulatory Commission or completing a detailed plan for achieving the necessary disposal capacity. *Id.*
- January 1, 1992, for completion of all license applications. *Id.*

Each of these deadlines is enforced by financial incentives. *Id.* § 2021e(e)(2). Surcharges up to $40 a cubic foot are imposed on the waste that New York exports to disposal sites in other states. New York receives a rebate of 25% of these surcharges, but only if and when it meets each deadline. *Id.* § 2021e(d). If it misses a deadline, it not only loses the rebate income, but any waste that it or its citizens export may be charged as much as four times the normal surcharge.

A separate provision sets January 1, 1993, as the deadline for New York, along with other states, to provide for disposal of all low-level waste generated within its borders. States that miss this deadline receive no further surcharge rebates unless they take title to the waste. *Id.* § 2021e(d)(2)(C). In addition, other states

are authorized to refuse to accept waste from New York on this date. *Id.* § 2021e(e)(2)(C).

Finally, on January 1, 1996, if no disposal site is operating in New York, the 1985 Act forces the state to take title to all low-level radioactive waste within its borders. *Id.* § 2021e(d)(2)(C). What is more, any waste generator in the state may demand that the state take actual possession of the waste. If New York does not do so immediately, the state is "liable for all damages directly or indirectly incurred" as a result. *Id.*

The deadlines and the "take title" provision of the 1985 Act operate together to bend the state to Congress's will. Even if New York is willing to give up the rebates Congress has offered and to risk the reprisals from other states that Congress has authorized, the "take title" provision ensures that it cannot long resist the federal command.

On January 1, 1996, if New York still refuses to exercise governmental authority over low-level radioactive waste, it will become the owner of the waste. Then what New York chooses not to do as a government it will be forced to do as an owner.

Nor is this a distant prospect. Because the regulatory process is a lengthy one, New York cannot delay compliance with Congress's command until the 1996 deadline is imminent. If the "take title" provision is enforceable, New York must take steps now to conform to Congress's directive.

SUMMARY OF ARGUMENT

The Framers believed that liberty was best preserved by dividing the responsibilities of power among many jealous rivals—executive and legislative, state and federal. To protect the role of states as laboratories of social change and challengers of national orthodoxy, the Framers gave the federal government powers that were

"few and defined," a safeguard reemphasized in the bill of rights, whose tenth amendment reserved for the states and the people all powers not delegated to the new central government.

Among the delegated powers was authority "to regulate Commerce . . . among the several States." As the nation grew, so did this power. Today, no one would challenge Congress's authority to regulate all commerce in radioactive waste, even to the point of preempting the field. But in the 1985 Act Congress chose to regulate not commerce but the states themselves. It singled out state governments for commands that could only be directed to governments. If the combination of the commerce clause and the tenth amendment mean anything, it is that Congress's power to regulate commerce does not include the power to regulate the states in this fashion.

For two hundred years, it has been the understanding of all—Congress, President, and courts—that such commands could not be issued to the states. As recently as 1977, the United States refused even to defend federal regulations that tried to issue commands to the states. *EPA v. Brown*, 431 U.S. 99 (1977). And this Court strained mightily as recently as 1982 to construe apparent Congressional mandates as mere exhortations and guarantees of equality for federal claims in state fora. *FERC v. Mississippi*, 456 U.S. 742 (1982).

There is no reason to take a different view today. Congress's authority to address commands directly to the states was not at issue in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) and *South Carolina v. Baker*, 485 U.S. 505 (1988). Those cases addressed the more vexing question of when states must be exempted from laws that apply to private parties and even to the federal government itself. Before *Garcia*, the Court encountered difficulties in deciding which governmental functions were so traditional and integral that they deserved exemption from general federal laws. These

difficulties do not arise when Congress tries to regulate the states alone. Such regulation almost by definition is regulation not of commerce but of the states' governmental activities.

Nor can there be any claim that the political safeguards invoked in *Garcia* and *Baker* will protect the states from such mandates. Federal politicians will not long resist the opportunity to pass laws that let them keep the credit and delegate the blame. As this case shows. The Congressmen who passed the 1985 Act and took credit for solving the radioactive waste problem were nowhere to be seen when the time came to decide who would pay the price. Laws that blur accountability in this fashion are not just bad government. They undercut the assumption of the Framers that the states would remain independent centers of power accountable directly to the people.

The United States' suggestion that this is a case for balancing only demonstrates the wisdom of a flat prohibition on federal commands aimed at the states. There is no federal interest in solving the waste problem by forcing states to regulate it. Congress can solve it overnight by issuing statutory regulations in its own name. Nor are the states' interests in sovereignty accommodated by leaving them some discretion to shape the details. What matters is the leash, not its length.

Finally, the "take title" provision cannot be used as an "incentive" like federal grants, *see South Dakota v. Dole*, 483 U.S. 203 (1987), or the threat of federal preemption. *See Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981). In the first place, the 1985 Act gives the states no choice. Whether as owner or as government, they must provide for the disposal of all the radioactive waste within their borders. And in the second place, unlike the grants and threats of preemption approved in other cases, this provision itself exceeds Congress's authority. The commerce clause

simply does not authorize Congress to aim punitive measures at the states in order to enforce federal commands.

ARGUMENT

I. THE COMMERCE CLAUSE DOES NOT AUTHORIZE CONGRESS TO ISSUE COMMANDS TO THE STATES

Those who framed our constitutional structure mistrusted all concentrations of power. They designed a system in which "[p]ower [is] almost always the rival of power." The Federalist No. 28, at 181 (A. Hamilton) (Clinton Rossiter ed., 1961) (hereinafter "The Federalist No. ——"). Thus, the Constitution allocates power among the branches of the federal government and between the states and federal governments. Each has its own responsibilities. Each is accountable to the people for the exercise of its powers. The resulting rivalry was intended to be a bulwark "to the rights of the people. The different governments will control each other." The Federalist No. 51, at 323 (J. Madison). *See also* The Federalist No. 28, at 181 (A. Hamilton) ("[T]he general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government.").

The role of the federal government was limited; its powers were "few and defined." The Federalist No. 45, at 292 (J. Madison). Even so, the ratification debate revealed that the nation's greatest concern was not strengthening the general government but preserving the states as rival centers of power and guarantors against federal authority. The price of ratification was adoption of a bill of rights, including the tenth amendment, which reemphasized the central role of the states in governing the country.

The Framers' efforts to limit federal power over private citizens by defining its powers narrowly has been largely

undone by the growth of interstate commerce. Over the years, the federal government's reach has expanded as fast and as far as our economy. 2 Encyclopedia of the American Constitution, *Federalism* 697 (1986).

But the growth of the federal role is no reason for the states to abandon the role that the Framers assigned to them. Quite the contrary. Now more than ever, the autonomy of states must be preserved in order to foster leaders, as well as social policies, that challenge national orthodoxy. *New States Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

But the states can only play this constitutional role for so long as they are able to govern in their own way and on their own terms. The growth of the federal commerce power has meant an inevitable restriction on the states' ability to regulate private conduct free from the threat of federal preemption. And a deeply divided Court has recently held that when Congress regulates private conduct it may apply the same rules to the states. *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528 (1985). But neither of those aspects of state sovereignty is at issue in this case.

The issue here is whether Congress's power to "regulate Commerce . . . among the several states" includes the power to regulate the states and only the states, to single out state governments and command them to govern in accordance with Congress's will.

II. THIS COURT HAS NEVER INTERPRETED THE COMMERCE CAUSE TO PERMIT SUBSTANTIVE CONGRESSIONAL COMMANDS TO THE STATES

Such a notion could hardly be further from the Framers' vision. For two hundred years it has been assumed that the commerce clause confers no power to issue commands to the states. As recently as 1977, for example, the Solicitor General of the United States conceded that

federal authorities could not order states to adopt laws or regulations. His brief in that case disavowed "any power to compel the State to carry out its governmental responsibilities. . . . Nor [did] he contend that he can direct the State to adopt laws or regulations . . . that comply with" federal law. Brief for Federal Parties at 20 n.14, *EPA v. Brown*, 431 U.S. 99 (1977) (Nos. 75-909, 75-960, 75-1050, 75-1055). This Court accepted and acted upon the government's concession. *EPA v. Brown*, 431 U.S. 99, 103 (1977).

A. *FERC v. Mississippi* Provides No Authority for Congressional Mandates

The most recent case to examine this issue, *FERC v. Mississippi*, 456 U.S. 742 (1982), does little to modify the assumptions reflected in *EPA v. Brown*. The *FERC* Court cited only one case permitting Congress to single out states for direct regulation—*Testa v. Katt*, 330 U.S. 386 (1947).[1] But in that case, Congress had simply au-

[1] *FERC* cited two other cases, neither of which is in point here. One was *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, *modified*, 444 U.S. 816 (1979). It was said to show that "[F]ederal law [can] impose an affirmative obligation upon state officials to prepare administrative regulations." *FERC*, 456 U.S. at 762 & n.27. In fact, as Professor Tribe as written,

> The Court in that case held no such thing. The power of the federal Court in *Fishing Vessel Ass'n.* derived from the fact that various state fishing regulations were in direct contravention of a federal Indian treaty and that, as parties to the litigation, the state fish and game agencies could be ordered to comply with the district court's ruling. The *Fishing Vessel Ass'n.* Court expressed its doubt that state agencies "may be ordered actually to promulgate regulations having effect as a matter of state law," and therefore directed that, should the state authorities be unwilling or unable to comply, the district court should take over supervision of the state fisheries and issue its own detailed remedial orders.

Laurence H. Tribe, *Constitutional Choices* 127 (1985) (citations omitted). Thus, *Fishing Vessel Association* simply stands for the proposition that federal courts can enforce their judgments, not that Congress can issue commands to the states.

The other case, *Fry v. United States*, 421 U.S. 542 (1975), upheld the constitutionality of a federal wage freeze that applied "to employees throughout the economy, including those employed by state and local governments." *Id.* at 546. This law, like those examined in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) and *South Carolina v. Baker*, 485 U.S. 505 (1988), applied equally to private and public sectors: "It contained no exceptions for employees of any governmental bodies, even at the federal level." *Fry*, 421 U.S. at 546. As is discussed below, such generally applicable statutes must be analyzed quite differently from laws singling out the states.

thorized the filing of certain federal claims in state as well as in federal court; *Testa v. Katt* held that state courts could not refuse to hear such claims if the claims otherwise fell within the state courts' jurisdiction. *Id.* at 394.

That limited holding offers no support for the 1985 Act. *Testa v. Katt* simply assured that federal law would be applied on a plane of equality with state law. This is a necessity under a Constitution that envisions the possibility that *all* federal law will be applied by state courts in the first instance. *Cf. Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). And unlike the 1985 Act, the substantive policies of the federal government in *Testa v. Katt* operated only on private citizens; states were not required to adopt the policies as their own.

The Court's reluctance to authorize broader federal commands is illustrated by the opinion in *FERC* itself. To avoid approving a congressional mandate directed at the states, the *FERC* Court first read the federal law in dispute extraordinarily narrowly—reducing it to a handful of redundant procedural requirements and exhortations—and then declared that the law was not in fact a command.

The statute reviewed in *FERC* had three elements. The Court treated the first element as nothing more than a variation on *Testa v. Katt*. It required that the Mississippi Utilities Commission "simply . . . open[] its doors" to federal claims similar to the state-law claims it already adjudicated. *FERC*, 456 U.S. at 760. Second, the federal law required state commissions to "consider" adopting various ratemaking standards recommended by Congress. The *FERC* Court noted that the Mississippi Utilities Commission had no obligation to adopt the standards; the federal mandate was "essentially hortatory." *Id.* at 770. The third element—a requirement that the Commission follow certain procedures in considering the standards—was more prescriptive. But the Court concluded that the federal law seemed "to accord few, if any, procedural rights not already established by Mississippi law." *Id.* at 770 n.34.[2] As the Court noted, the lack of identifiable differences between state practice and federal law meant that the federal law necessarily withstood the state's facial attack. *Id.* at 769 n.31. Indeed, if the federal and state procedures were not observably different, the federally mandated procedures were simply not at issue.

Read so narrowly, the federal law could have been upheld simply by ruling that *Testa v. Katt* remains good law and that Congress may address hortatory resolutions to the states. Neither holding would provide support for

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[2] The Court elaborated on this point in another passage:

> It is hardly clear on the statute's face, then, that PURPA's standing and appeal provisions grant any rights beyond those presently accorded by Mississippi law, and appellees point to no specific provision of the Act expanding on the State's existing, liberal approach to public participation in ratemaking.

Id. at 769.

the substantive mandates found in the 1985 Act. But the Court in *FERC* was unwilling to go even that far. It ultimately concluded that the federal law was not even a command; it held that the statute actually offered the states a choice between continued state regulation and federal preemption. While this aspect of the case may not survive more recent case law, *see infra*, pages 22-23, the Court's reluctance to approve even so limited a mandate illustrates the complete lack of constitutional authority for such commands.

B. Cases Denying States Exemptions From Generally Applicable Laws Have No Relevance to This Case

Nor can the 1985 Act be justified by reference to *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) and *South Carolina v. Baker*, 485 U.S. 505 (1988). Those cases permitted Congress to impose the same duties on states that it imposed on private parties and the federal government. Both *Garcia* and *Baker* recognized that mandates issued directly to the states would likely be judged under a different standard. And so they should. The reasons the majority gave in *Garcia* and *Baker* for limiting judicial protection of federalism have no application to laws that single out the states for direct regulation.

1. Both *Garcia* and *Baker* set aside for another day the issue presented here. *Garcia*, for example, expressly recognized that the Constitution may place "affirmative limits" on federal action affecting the states. 469 U.S. at 556.

For this proposition it cited *Coyle v. Oklahoma*, 221 U.S. 559 (1911). *Coyle* held that Congress may not deprive a state of the power to choose the location of its capital. *Id.* at 565, 574. Of one thing we may be sure—*Garcia* did not preserve *Coyle* because a state's designation of its capital is more "integral" to self-government than the right to set the wages and hours of state em-

ployees. Quite the contrary, *Garcia* expressly disavowed as futile an effort to identify integral state functions. Rather, *Coyle* remains good law because, unlike the generally applicable wage and hour law upheld in *Garcia*,[3] the congressional enactment invalidated in *Coyle* applied only to a state government—indeed could only apply to a state government.

Like *Garcia*, *South Carolina v. Baker*, 485 U.S. 505 (1988), dealt with a federal statute that imposed the same obligations on states as on private parties and the federal government. *Id.* at 510 n.3 & 514. And like *Garcia*, *Baker* reserved for a later day the validity of laws aimed solely at the states. The *Baker* Court explicitly recognized that *Garcia* did not foreclose "the possibility that the tenth amendment might set some limits on Congress' power to compel States to regulate on behalf of federal interests." 485 U.S. at 513.

2. The reticence of the *Garcia* and *Baker* Courts on this issue suggests strongly that a different analysis applies to federal laws that are aimed at state governments. And examination of the reasoning in *Garcia* and *Baker* shows that the Court's two central rationales have no application outside the context of generally applicable federal statutes.

a. First, in *Garcia* the Court rejected its earlier view that certain traditional and integral state functions had to be exempted from generally applicable federal laws. *See National League of Cities v. Usery*, 426 U.S. 833 (1976). The *Garcia* majority concluded that the job of identifying protected state functions was simply too hard:

> We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is "integral" or "traditional."

469 U.S. at 546-47.

[3] The Fair Labor Standards Act covers virtually all employees of private businesses and most individuals "employed by the government of the United States. . . ." *See* 29 U.S.C. § 203(e)(1) & (2) (1988).

In fact, the need to draw this distinction arises only in the context of federal laws that regulate the private as well as the public sector. State governments engage in a wide variety of commercial activities. In deciding which state activities to exempt from federal law, it is necessary to distinguish the states' most important governmental functions from peripheral commercial activities. *See, e.g., EEOC v. Wyoming*, 460 U.S. 226 (1983); *United Transp. Union v. Long Island R.R.*, 455 U.S. 678 (1982). Otherwise, all state-owned enterprises would have to be exempted from a vast array of federal regulation.

No such difficulties are posed when Congress's commands are aimed directly at state and local governments. There is only one reason for Congress to single out state governments, and that is to tell the states how to exercise their governmental authority. A federal command aimed solely at state and local governments almost always represents a federal intrusion into the policy-making discretion the state previously exercised. And because it regulates the act of governing, such a law falls outside Congress's power to regulate commerce.

b. The second basis for *Garcia*'s deference to Congress was the view that states are protected by political and structural safeguards that make judicial intervention unnecessary. *Garcia*, 469 U.S. at 547-55.

i. Before showing that no such safeguards restrain Congress from issuing direct federal commands to the states, it is worth pausing for a moment to recall just how remarkable *Garcia*'s analysis is. The sovereignty of the states is a "fundamental principle" of our Constitution. *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2399 (1991).

Fundamental constitutional principles of any sort are rarely entrusted utterly to the political process.[4]

Nor are the Constitution's structural postulates ordinarily left to the tender mercies of the political process. The separation of powers at the federal level, for example, serves the same purpose in the Framers' design as the sovereignty of the states. *See generally* The Federalist No. 51, at 322-23 (J. Madison). The division of power among state and federal governments—like the division of the federal government into three branches or the division of Congress into House and Senate—protects liberty by creating rival centers of power, all with enough power to resist sweeping changes in the law. *Id.* This in turn ensures that political change comes only as a result of sustained consensus instead of a fit of majority enthusiasm.

Given this similarity of purpose, one would expect the Court's approach to policing the borders of executive or legislative power to parallel its approach to the balance between state and federal authority. Yet the Court has never held that the President's potent political safeguards justify abandonment of a judicial role in protecting executive prerogatives.[5]

The analysis employed in *Garcia* and *Baker* is thus at best a constitutional anomaly. There is no basis for ex-

[4] Certainly no such analysis applies to individual rights. In Justice Powell's words, "One can hardly imagine this Court saying that because Congress is composed of individuals, individual rights guaranteed by the Bill of Rights are amply protected by the political process." *Garcia*, 469 U.S. at 565 n.8 (Powell, J., dissenting).

[5] *See Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983) (one-house legislative veto unconstitutional). Indeed, the President need not even use his most obvious structural protection—the veto—in order to preserve the claim that a law intrudes unconstitutionally on his prerogatives. *See Buckley v. Valeo*, 424 U.S. 1, 118-37 (1976) (Federal Election Campaign Act violates President's appointment power despite President's approval of Act); *Myers v. United States*, 272 U.S. 52 (1926) (congressional statute denying President's unrestricted power of removal of executive officers is unconstitutional despite President's approval of the statute).

panding a style of analysis so alien to ordinary principles of constitutional interpretation.

ii. *Garcia* and *Baker* are perhaps better grounded in practical politics than constitutional structure. For it is certainly true as a practical matter that federal legislators understand how government works. They understand the difficulties of applying private sector rules mechanically to government agencies. And as the *Garcia* Court observed, they have been willing to grant state and local governments at least partial exemptions from some of these rules. *See Garcia*, 469 U.S. at 552-53.

This modest political success on the part of the states is hardly the same as constitutional protection. And in any event it becomes irrelevant when Congress is offered the opportunity to single out state governments for direct federal mandates. For in practical politics, no legislator can resist a chance to take credit for the good things his or her laws accomplish while letting others take the blame for the bad.

Federal legislation directed at state and local governments inevitably offers this opportunity, as this case shows. Passage of the 1985 Act allowed U.S. Senators and Representatives to tell all generators of radioactive waste in their districts that a solution to the disposal crisis had been found. But when it came time to tell the people of Allegany and Cortland Counties that the solution meant a radioactive dump in their backyards, federal legislators were nowhere to be seen. The ire of the voters was directed entirely at state[6] and local[7] officials. (In

[6] *E.g.*, Phil Fairbanks, *Plan for N-dump Buried in Secrecy for Over a Year*, Buffalo News, June 30, 1991, at A-1, A-13 (opponents to a "secret" plan for a dump site in West Valley blame Governor Cuomo for the deal); Billy House, *Nuke Site Depends on One Man*, Rochester Democrat & Chronicle, July 12, 1991, at 1B, 2B (state legislators feel pressure of opposition in deciding whether to grant town board's request to host dump site).

[7] *E.g.*, Sam Howe Verhovek, *Town Heatedly Debates Merits of a Nuclear Waste Dump*, N.Y. Times, June 3, 1991, at B-1, B-5 (mem-

this light, the United States hardly advances its case by emphasizing, as it does, that New York's Senator Moynihan supported the 1985 Act with enthusiasm. Well he might.)

Permitting Congress to blur state and federal responsibilities in this fashion also runs counter to the Framers' vision of separate state and federal governments, each separately accountable to the voters. "If [the peoples'] rights are invaded by either" state or federal government, Hamilton declared, "they can make use of the other as the instrument of redress." The Federalist No. 28, at 181 (A. Hamilton). But if Congress itself can make use of the states as its own instrument, this counterpoise to central authority is gone.

C. Congressional Commands Cannot Be Justified by Balancing State and Federal Interests

Although neither the case law nor the Constitution authorizes Congressional directives aimed at the states, the United States suggests that a flat prohibition on such directives would be too "wooden." Brief for the United States in Opposition at 17, *New York v. United States*, (Nos. 91-543, 91-558, 91-563) (1991) (hereinafter "U.S. Brief Opp. Cert."). It urges instead that the Court apply a balancing test, said to be derived from *National League of Cities*. *Id.* at 17-18.

The United States asks the Court to balance Congress's interest in avoiding a crisis in radioactive waste disposal against the states' interest in sovereignty. The arguments of the United States in fact show precisely why a balancing test is unwarranted.

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bers of the town board of Ashford face fierce opposition in deciding whether to accept benefits in exchange for dump site at West Valley); Donna Snyder & Phil Fairbanks, *Cattaraugus Says 'No' to N-dump*, Buffalo News, July 16, 1991, at A1, A6 (opposition influences county legislators to vote against incentives linked to West Valley site).

First, there is simply no legitimate federal interest in regulating the states themselves. Without doubt, finding responsible ways to dispose of radioactive waste is an important concern. But any federal interest in regulating radioactive waste disposal can easily be vindicated without issuing directives to the states. Congress has the unquestioned power to regulate interstate traffic in radioactive waste. It has full authority to designate, and even acquire by condemnation, adequate disposal sites. The federal government can thus prevent the crisis it says it fears at any time—simply by taking responsibility for the solution. Practical politics aside, there is no obvious reason why it must cloak itself in the states' authority.

The considerations that the United States places on the other side of the balance also demonstrate a tin ear for the principles of accountability that inform constitutional federalism. New York has already decided to regulate in this field, the United States argues, and in any event the federal mandate leaves lots of details for New York to fill in. U.S. Brief Opp. Cert. at 10-12, 18-19.

These arguments miss the point. It does not matter that New York has already engaged in regulation of radioactive waste or that in 1986 it announced its intention to designate a site for such waste. Democracy is not tidy, and no decision is made once for all time. Self-government means the right to unmake as well as to make decisions, to delay as well as to implement past policies. This aspect of the United States' balancing test is simply a disguised forfeiture of New York's sovereignty.

It is a disguise that quickly wears thin, for the "choice" that New York is said to have exercised has a remarkably elastic definition. In the courts below, the United States argued that once states had made a choice "to participate in the nuclear economy" they could be forced to regulate radioactive waste. Brief for the Defendants Appellees at 37, *New York v. United States*,

942 F.2d 114 (2nd Cir. 1991) (Nos. 91-6031, 91-6033, 91-6035) (hereinafter Brief for Defendants). And according to the United States, a state has chosen to "participate in the nuclear economy" as soon as it engages in any activity that generates low-level waste. *Id.* As this reasoning shows, adjusting the level of abstraction would allow the United States to conclude that any conceivable Congressional mandate is only a supplement to choices already made by the states.

Perhaps most contrary to the Framers' vision of the states' role is the United States' suggestion that the 1985 Act should be upheld because the states retain a large measure of discretion in carrying out Congress's mandate. So does a Regional Director in the U.S. Department of Health and Human Services. But states, unlike federal bureaucrats, are accountable to the voters for the laws they pass and the decisions they make. If Congress may hide its commands like cowbird eggs among the states' enactments,[8] both state and federal representatives will be less accountable. "It is . . . control and accountability that the Framers understood would insure the vitality and preservation of the federal system that the Constitution explicitly requires." *Garcia*, 469 U.S. at 579 (Powell, J., dissenting). *See generally* La Pierre, *Political Accountability in the National Political Process—The Alternative to Judicial Review of Federalism Issues*, 80 Nw. U. L. Rev. 577 (1985).

The United States' emphasis on the states' remaining discretion thus avails the 1985 Act not at all. Viewed

[8] Cowbirds are brood parasites: They do not raise their own young, but lay their eggs in the nest of another species, after having removed one egg from the host's clutch. When it hatches and begins to grow, the young cowbird is usually so much larger than the young of its foster parents that the other nestlings either starve or are crowded out.

Audubon Society, Pocket Guides—Familiar Birds of North America 90 (Ann. H. Whitman *et al.* ed., 1986).

through a prism of accountability, federal commands that delegate most of the unpopular decisions to the states are more troubling for the federal system, not less. What is more, the distinction is unworkable in practice. No federal law is so comprehensive as to leave the administrator utterly without discretion, and the United States does not suggest how courts can measure the quantum of state discretion in this or future mandates. It will be fruitless for courts to try to decide which mandates leave the states "enough" discretion. What matters is the leash, not its length.

D. Offering a Choice Between Regulating Waste and Taking Title To It Does Not Save the 1985 Act

1. Nor can the 1985 Act be justified as offering New York a choice between either regulating or taking title to the low-level radioactive waste within its borders. In the first place, this is no choice. New York must designate a waste disposal site in its capacity as a government or the "take title" provision will force New York to find a disposal site in its capacity as owner.

The United States has candidly admitted that this aspect of the law "might raise . . . federalism concerns." U.S. Brief Opp. Cert. at 25. But it suggests that the provision should be approved because it "merely adjusts rights and responsibilities between LLRW generators and the States in which they operate." U.S. Brief Opp. Cert. at 26. It is hard to take this statement seriously. What the provision shifts is *ownership* of the waste. It will make the states involuntary owners of radioactive waste that is now owned by private parties and even by the federal government itself. *See* 42 U.S.C. §§ 2021c(a)(1); 2021e(d)(2)(C). If this is permissible (the United States offers no authority for the point), there is no reason why Congress cannot also "shift responsibility"

to the states for the federal budget deficit and every other inconvenient aspect of governing."

2. In theory, of course, the state has a choice between taking physical possession of the waste and paying damages. The United States suggests that this is a saving grace, because it means that the "take title" provision itself does not directly impose "federal commands and sanctions." U.S. Brief Opp. Cert. at 27. But the Constitution does not protect states solely from federal directives enforced by threats of imprisonment. And apart from imposing criminal liability, there are few sanctions harsher—or more inimical to principles of federalism—than the damages liability envisioned in the 1985 Act. *See Edelman v. Jordan*, 415 U.S. 651 (1974). Moreover, there is no doubt that the damages provision was designed to enforce Congress's mandate, not to offer the states a genuine choice between regulating in this field or not. In the words of one Senator, a co-sponsor of the provision, "the term 'damages' includes both actual and punitive damages. . . . It is a very far-reaching, difficult and punitive provision, but we meant it to be precisely that." 131 Cong. Rec. 38414-15 (daily ed. Dec. 19, 1985) (statement of Sen. Johnston).

This Court has never permitted Congress to coerce the states in such a fashion. It has approved only two methods by which Congress may induce states to follow Congress's lead.

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[9] Nor is the principle saved by limiting it to "pervasively regulated" fields with a "strong public interest." *See* U.S. Brief Opp. Cert. at 26. Until the 1980 and 1985 Acts, disposal of low-level radioactive waste was not pervasively regulated, especially at the federal level. Certainly such regulation was no more "pervasive" than regulation of land use, or mining, or education, or a hundred other fields that are equally the objects of a "strong public interest." If adopted, the argument of the United States would authorize Congress to issue commands in all of these fields and to back those commands by imposition of essentially unlimited financial penalties.

i. The first is the use of federal funds to encourage states to adopt national policies. *See South Dakota v. Dole*, 483 U.S. 203 (1987). Such financial incentives are also consistent with the principles of accountability that underlie the Constitution. As long as Congress must find a source of funds to support a major part of the costs of a regulatory program, it remains far more accountable than if it simply issues a mandate and lets the states try to find the money. Indeed, this Court has been reluctant to approve even financial incentives that go beyond principles of accountability. If Congress threatened to cut off its funding of unrelated state programs as a way of forcing New York to regulate radioactive waste, "the financial inducement offered by Congress might be so coercive as to be unconstitutional." *See Baker*, 485 U.S. at 511 n.6 (*citing South Dakota v. Dole*, 483 U.S. 203, 210-211 (1987)).

The 1985 Act in fact already offers strong financial incentives to the states. States that meet Congress's deadlines receive rebates from a federal escrow account. 42 U.S.C. § 2021e(d)(2). No one has challenged these incentives as coercive or beyond Congress's power. Nor is it clear that these incentives by themselves will not in time lead the states to designate sufficient disposal sites around the nation.[10]

ii. Congress may also offer the states a choice between regulating on their own and letting Congress do it. *See Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981) (upholding federal statute giving states a choice between administering a federal

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[10] Similarly, the 1985 Act allows other states to exclude New York's waste after January 1, 1993. 42 U.S.C. § 2021e(e)(2)(C). This provision too creates an incentive to join the federal scheme, but it does so in a way that enhances accountability. It makes clear to waste generators in New York that only New York's government can resolve the question of what to do with low-level radioactive waste.

regulatory program or allowing federal government to do so).[11] A choice of this kind is also consistent with the principle of accountability. The states may accept or reject the federal regulatory program. If they reject it, Congress must take responsibility for implementing the program it has devised.

b. The 1985 Act fits neither of these examples. The United States did suggest below that the 1985 Act offers an implicit choice—between regulating in accordance with the federal mandate and participating in the nuclear economy. Brief for Defendants at 39. By this argument, the United States sought to expand a doubtful aspect of the reasoning in *FERC v. Mississippi*, 456 U.S. 742, 763-64 (1982). As noted above, the *FERC* Court was reluctant to approve even the limited mandates and exhortations imposed by Congress in that case, and it strained to find that Congress had actually given the state a choice between regulating utility rates in accordance with federal standards or not regulating at all. *Id.*

Unlike the choice offered in *Hodel*, however, the law at issue in *FERC* did not clearly state that Congress would be responsible for regulating if the states refused to do so. This deviation from principles of accountability is unfortunate because the *FERC* Court had already construed the federal statute so narrowly that it would have passed constitutional muster under *Testa v. Katt*. See discussion *supra*, at 8-11. In any event, the narrow reading of federal law adopted in *FERC* may now be the only surviving basis for that decision. The alternative ground—that Congress can intrude on state authority by offering an "implicit" choice between regulation and preemption—has been overtaken by this Court's more recent determination that Congress may not restrict state au-

[11] *See also* 42 U.S.C. § 2021(b) (U.S. Nuclear Regulatory Commission may enter into agreements ceding to states "authority to regulate the materials covered by the agreement for the protection of the public health and safety from radiation hazards.")

tonomy except by the plainest of statements. *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2401 (1991).

E. Interstate Adjudications Provide No Authority for Congressional Mandates

In the absence of precedent approving Congressional commands aimed at the states, the United States turns instead to a line of cases in which federal courts have issued judgments resolving interstate disputes over pollution and water rights.[12] The implicit reasoning of the United States is that if this Court can make federal rules to resolve disputes between states then surely Congress can do the same. The analogy is false in nearly every respect.

First, the disputes in the cited cases were inherently interstate in nature. What one state puts into or takes out of a flowing river inevitably affects all the states downstream. But radioactive waste is not an inherently interstate problem; it need not flow across state lines. Indeed, provisions of the 1985 Act that have not been challenged would prevent movement of low level radioactive waste from one state to another in the absence of state consent. 42 U.S.C. § 2021e(e)(2)(C); *see also id.* § 2021e(a).

Second, New York did not submit to Congress's jurisdiction as did the states in the cited cases. The lobbying activities of a group such as the National Governors' Association, which represents one branch of state government, cannot be compared to the formal waiver of state immunity that occurs in state-versus-state litigation. *See, e.g., Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 720 (1838). This case shows the pitfalls that

[12] U.S. Brief Opp. Cert. at 20-21 (citing *Illinois v. Milwaukee*, 406 U.S. 91 (1972); *New Jersey v. New York*, 283 U.S. 473 (1931); *Colorado v. New Mexico*, 459 U.S. 176 (1982); *Wyoming v. Colorado*, 309 U.S. 572 (1940)).

arise from trying to compare the two. The governors did indeed support many of the Act's elements. But the United States has notably failed to cite any widespread support for the "take-title" provision that was inserted by Congress at the eleventh hour and that is the object of this challenge. Accordingly, even if "lobbyists' waiver" were a constitutionally recognized doctrine, it would not apply to the provision that makes the 1985 Act objectionable.

Third, and perhaps most important, the fact that this Court has jurisdiction to resolve disputes among states does not confer upon Congress the power to issue orders to the states in the same field. This Court frequently decides controversies over state boundaries, *Indiana v. Kentucky*, 136 U.S. 479 (1890), but that does not mean that Congress has authority to redraw state boundaries. *Cf.* U.S. Const. art. IV, § 3.

III. THE EFFECTS OF THE "TAKE TITLE" PROVISION ARE ALREADY BEING FELT

It is no wonder, then, that the United States seeks to avoid a ruling on the constitutionality of the "take title" provisions by arguing that the provision's effects will not be felt until the end of 1995. The legal basis for this suggestion is unclear, since the United States admits that it has not challenged the suit as unripe. *See* U.S. Brief Opp. Cert. at 25. Nor can it. There is no dispute that the process of establishing a waste disposal site takes several years.[13] New York must make decisions today about whether and how fast to move on plans for a disposal site. The threat of future sanctions is thus already having a direct and immediate effect on New York's decisions about how to handle low-level radioactive waste.

[13] *E.g.*, H.R. Rep. 314, 99th Cong., 1st Sess., pt. 2, at 19 (1985) (five year period to allow the states to form compacts, select a site, complete license application and review, and construct a facility "has proven too short a time for accomplishing such a series of complex political and technical tasks"); *see also* Brief for Defendants at 10 (citing H.R. Report 314, *supra*).

Indeed, the effect is exacerbated by the nature of the penalty. Were it not for the "take title" provision, New York might reasonably choose to wait until 1996 or later before deciding to permit disposal of low-level radioactive waste within its borders. For example, New York might choose to wait because it expects that the economics of disposal operations will soon improve its bargaining position with other states. There are substantial economies of scale in radioactive waste disposal.[14] New York could reasonably believe that what is now seen as a shortage of waste disposal sites will soon become a glut, so that operators of sites in other states may eventually seek out New York's waste instead of shunning it. New York's estimate of market forces will not be tested until 1993. If its calculation turns out to be wrong, New York will have to designate a site, but it may not be able to complete its own facility by January 1, 1996.[15]

Ordinarily, missing a construction deadline by a few days would not be a driving concern. But because the "take title" provision is triggered if the site is opened even one day too late, a wait-and-see policy exposes New York to a serious risk of acquiring overnight the liability for as much as three years' worth of waste. This greatly increases the risk of choosing a go-slow policy. Thus the 1996 deadline is already narrowing New York's policy options.[16]

[14] *See, e.g.*, Brief for Defendants at 29 & n.29.

[15] There are other legitimate reasons for New York to go slowly. New York's decision-makers might well conclude that only a demonstrable crisis—arising from the refusal of other states to accept New York waste—will create a consensus favoring the opening of an in-state disposal site. Again, such a crisis will not occur until 1993, and even if a crisis galvanizes the state into consensus in that year, New York may not be able to finish a site by 1996.

[16] This is the answer to the United States' suggestion that New York must prove that it will inevitably miss the 1996 deadline—or that the consequences of missing the deadline will be longlasting. U.S. Brief Opp. Cert. at 26. If New York authorities conclude that

Nor can New York afford to wait until 1996 to find out whether the threatened penalty is constitutional. *Doe v. Bolton*, 410 U.S. 179, 188 (1973) (litigants "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief"); *see also Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298-99 (1979). *Cf. Steffel v. Thompson*, 415 U.S. 452, 459 (1974) (finding ripeness based on explicit threat of police arrest); *Clements v. Fashing*, 457 U.S. 957, 962 (1982) (finding ripeness based on automatic civil enforcement); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963) (finding ripe a constitutional challenge to a state agency's informal exhortation urging book distributors to stop selling books that the agency, which officially could only recommend prosecution, considered obscene). This is a straightforward if vital legal question, and waiting until the penalty is imposed would not clarify the dispute. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 81-82 (1978); *Abbott Lab. v. Gardner*, 387 U.S. 136, 148-49 (1967).

While disavowing ripeness as a defense, the United States seems to argue that a heavy burden nonetheless rests on New York to prove that the "take title" provision is having a current effect. U.S. Brief Opp. Cert. at 26. Even though a 1986 New York statute makes it plain that the state was compelled to regulate by the 1985 Act, the United States objects that "the introductory section of the law . . . makes no mention of the take-title provision." *Id.* at 25. But there is no basis in law or policy for a reverse "plain statement" requirement, in which states may challenge a coercive federal

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the "take title" provision will ultimately force them to regulate, it makes little sense for them to turn down the financial incentives for meeting Congress's timetable. Thus, the fact that New York has met some of these deadlines does not show, as the United States would have it, that New York has yet to feel the lash of the "take title" penalty.

law only if the states first enact statutes identifying not only the federal law but the precise section that has compelled them to act.

In a similar vein, the United States speculates that the "take title" provision might not be interpreted to create an independent federal cause of action for damages, or that it might not be read as requiring states to take physical possession of the waste. *Id.* at 26 & n.27. But the statute plainly declares that if states do not take possession of the waste they will find themselves "liable for all damages directly or indirectly incurred" by their generators. 42 U.S.C. § 2021e(d)(2)(C). The notion that such unambiguous language does not impose damages liability is strained at best. Senator Johnston, for one, announced that the provision imposes liability for "both actual and punitive damages." 131 Cong. Rec. 38414 (daily ed. Dec. 19, 1985). Certainly no prudent state decisionmaker would count on a narrower interpretation in deciding whether to heed the federal mandate. Speculation of this sort cannot save the "take title" provision from judicial review.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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February 14, 1992